

This decision will be included in the STB bound volumes of printed reports at a later date.

DECISION

STB Ex Parte No. 542 (Sub-No. 4)

REGULATIONS GOVERNING FEES FOR SERVICES PERFORMED IN CONNECTION WITH LICENSING AND RELATED SERVICES—2002 NEW FEES

Decided: March 23, 2004

On September 11, 2002, the Surface Transportation Board (Board) published a notice of proposed rulemaking (NPR) in the Federal Register (67 FR 57554, Sept. 11, 2002), proposing to amend its user fee regulations at 49 CFR part 1002 to accomplish the following: (1) establish 22 new fees for services provided by the Board for which no fee currently exists, including a catch-all, “basic” fee for STB adjudicatory services not covered by a specific fee item; (2) raise the below-cost fee assessment that currently applies to six fee items; (3) update fees for nine existing fee items; and (4) amend, renumber and delete certain rules to clarify the applicability and scope of certain fee items and to reflect current and proposed fee and billing practices and tariff requirements. A corresponding decision was served on August 29, 2002.

The Board requested comments on all aspects of the proceeding. In response to the notice, comments were filed by the Association of American Railroads, The Burlington Northern and Santa Fe Railway Company, the National Industrial Transportation League (NITL), the North Dakota Grain Dealers Association (NDGDA), the United Transportation Union - General Committee of Adjustment (UTU-GCA), and the Western Coal Traffic League (WCTL). This decision adopts the proposal as to all items that were not specifically questioned by any person filing comments; reduces or eliminates proposed fees as to certain other items that were questioned in the comments; and addresses other issues raised in the comments.

At the outset, it should be noted that the Board is required to assess fees for its services pursuant to the Independent Offices Appropriations Act, 31 U.S.C. 9701 (IOAA), which directs agencies to ensure that “. . . each service or thing of value provided by an agency . . . to a person . . . be self-sustaining to the extent possible.” 31 U.S.C. 9701(a). *See also* Office of Management and Budget (OMB) Circular No. A-25, User Fees, revised July 8, 1993 (Circular A-25), which expresses the general policy of the federal government that “[a] user charge will be assessed against each

identifiable recipient for special benefits derived from federal activities beyond those received by the general public.” Circular A-25, section 6.

The Board assesses no charges for services that benefit the public in general: among other things, the rulemakings that it conducts; the reading rooms and libraries (electronic and traditional) that the agency maintains for the public’s use; and the economic and other data that it collects, maintains and makes available to the public. And although all of the services provided by the Board, and other agencies, benefit the general public, the services for which fees are set provide specific benefits to the parties that invoke the Board’s processes. Thus, the Board must and will continue to assess fees. *See Regulations Governing Fees for Services*, 1 I.C.C.2d 60 (1984), *aff’d*, *Cent. & Southern Motor Freight Tariff Ass’n. v. U.S.*, 777 F.2d 722 (D.C. Cir. 1985); *National Cable Television Association, Inc. v. United States*, 415 U.S. 336, 341 (1974); *Mississippi Power & Light Co. v. NRC*, 554 F.2d 223, 227 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Seafarers Intern. Union of North America v. U.S. Coast Guard*, 81 F.3d 179 (D.C. Cir. 1996).

Following is a discussion of the issues that were raised as to specific fee items proposed.

SPECIFIC FEE ITEMS

Fee item (12)(iv), A request for a determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10901(d) - \$10,100. NITL contends that the proposed \$10,100 fee is excessive and may have a “chilling effect” on construction projects that have pro-competitive effects, contrary to the rail transportation policy at 49 U.S.C. 10101(4), (5) and (7). WCTL suggests that shifting the not insubstantial fee to the party trying to block or delay the construction would facilitate the completion of these projects.

The fee will be lowered to \$200 to ensure that Board-approved construction projects proceed without delay. A fee of \$200, borne by the party seeking the order, should not stand in the way of any party interested in having the Board resolve a crossing dispute.

Fee item (56)(ii), A formal complaint involving rail maximum rates filed by a small shipper - \$150. NDGD, NITL and UTU-GCA support the proposed fee because it will minimize the cost hurdle that complainants would otherwise have to clear. UTU-GCA recommends that the lower fee be available not only if the complaint is filed by a small shipper, but also if the complaint is filed by any entity, such as a trade association or employee organization, and involves rates paid by small shippers.

The level of the proposed fee, which various commenters support, will be adopted. The description of this fee item, however, appears to have created some confusion. The purpose of the

reduced fee is to make the Board's dispute resolution processes accessible in matters involving the small rate case procedures, whether or not the complainant itself is a small shipper. The public interest in having such complaints heard by the Board is furthered by making the reduced fee available to any party filing such a complaint. The description of this fee will be modified to reflect that it applies to any formal complaint filed under the small rate case procedures.

Fee item 61(i), An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d) - \$200. UTU-GCA correctly points out that the description of the fee is being modified by adding the phrase "on the merits" and that the fee would apply to decisions made by any person on behalf of the Board. The NPR explained that the descriptions of certain fee items were being amended to clarify their applicability and scope. There was some confusion with respect to the applicability of fee item 61, and so a proposal was made to clarify matters by establishing one fee for merits appeals and another for appeals of procedural rulings. In addition, the NPR was intended to clarify that the fee would apply, whether the appeal was from a decision of the entire Board, individual Members, or persons acting under authority delegated to them by the Board. These modifications make the fee schedule more precise and, therefore, easier for the public and Board staff to apply.

Fee item 61(ii), An appeal of Board decisions on procedural matters except discovery - \$250. UTU-GCA argues that the proposed fee is punitive, increases the power of Board staff over the public and isolates staff procedural decisions from effective Board supervision. UTU-GCA maintains that the fee is inappropriate because the public should not have to pay for correcting an error made by Board staff.

UTU-GCA's arguments that Board staff are inappropriately empowered with decisionmaking authority and isolated from effective Board supervision are misplaced. The Board has exercised with care, and with an eye toward efficiency and experience, its authority to delegate decisionmaking responsibility to Board staff, and UTU-GCA has provided no specific examples of staff abuses of authority. Attaching a very modest fee to appeals of staff decisions does not, as UTU-GCA asserts, increase staff decisionmaking authority; the scope of staff authority is not changed by the action here. Nor can UTU-GCA's inference that staff must be reined in by the Board through the appellate process be accepted. To the contrary, most decisions issued by staff under delegated authority are upheld when challenged administratively. The fee will be adopted as proposed.

Fee item 64(i), A motion to compel discovery in formal complaint proceedings under 49 U.S.C. 10704(c)(1) - \$2,300. In the prior decision, the Board, concerned about the way the discovery process was being used, proposed a new fee, and proposed a "fee-shifting" approach under which the party moving to compel discovery, if successful, would be reimbursed for its filing fee by the party against which discovery was sought. There are substantial questions, however, as to the Board's

authority to impose a fee-shifting requirement, and moreover, since the prior decision was issued, the Board has adopted new procedures designed to expedite and simplify the discovery process in rail rate cases. *See Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638 (STB served Apr. 3, 2003), at 4-6. Given those new procedures, which appear to be working well — *see* the Board’s press release summarizing the informal discovery conference in *AEP Texas North Co. v. The Burlington Northern & Santa Fe Ry.*, STB Docket No. 41191 (Sub-No. 1), issued on November 14, 2003 — the Board will not adopt the proposed fee at this time. Although the new procedures apply specifically only in major rail rate cases, it is hoped that their benefits will be felt in other cases as well. For that reason, the Board will also, for the time being, not adopt proposed fee items (64)(ii) and (64)(iii), which would have imposed fees for discovery in other types of cases and for appeals of discovery rulings, respectively.

Fee item 88, Basic fee for STB adjudicatory services not otherwise covered - \$200.

UTU-GCA maintains that the proposed fee item is too vague to be applied and is another example of agency staff seeking to bolster its role in the regulatory process.

The scope of the proposed fee item is clear. As stated in the NPR, while the Board has a fairly extensive fee schedule, the list is not exhaustive. On occasion the agency receives filings that are not specifically covered by the list of fee items, but that nevertheless require the Board to render “adjudicatory services,” that is, services that require more than ministerial action on the part of the Board. The Board does not intend that this fee item cover procedural motions for relief. The fee schedule already contains a number of fee items for specifically identified motions for procedural relief that consume substantial Board resources. Those specific fees will continue to apply to the specific procedural relief requested. The Board does intend to charge fees for other, more substantive filings that require docketing and issuance of an order. It is appropriate to charge a minimal fee to cover the costs incurred by the Board in handling such matters. Adopting this fee will not result in staff usurping the power of the Board to regulate but should instead merely equip staff to implement policy set by the Board. The fee will be adopted as proposed.

Because the Board is not adopting proposed fee items (64)(i), (ii) and (iii), proposed fee item (65) will be renumbered as fee item (64). All of the other proposed, raised and updated fees, amended and renumbered rules, and modifications to rules to reflect current and proposed fee and billing practices, waiver practices and tariff requirements were not specifically addressed in the comments, and they will be adopted as proposed.

The fee items and rule modifications adopted here will not have a significant economic impact on a substantial number of small entities. The Board’s regulations provide for waiver or reduction of filing fees for those entities that can make the required showing of financial hardship or public interest.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The final rules set forth in the Appendix to this decision are adopted.
2. Notice will be published in the Federal Register.
3. Notice of the final rules adopted here will be transmitted to Congress pursuant to Pub. L. No. 104-121 (Mar. 29, 1996).
4. This decision and the final rules adopted here are effective on April 28, 2004.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

APPENDIX

For the reasons set forth in the decision, the Surface Transportation Board amends 49 CFR part 1002 as follows:

PART 1002--FEES

1. The authority citation for part 1002 is revised to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721.

Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend section 1002.1 as follows:

- a. Redesignate paragraphs (e) through (h) as paragraphs (f) through (i);

- b. Remove newly redesignated paragraph (f)(2) and designate newly redesignated paragraph (f)(3) as paragraph (f)(2);

- c. Add new paragraph (e) and revise newly redesignated paragraphs (g)(7), (g)(8) and (h) to read as follows:

§1002.1 Fees for records search, review, copying, certification, and related services.

* * * * *

(e) Fees for courier services to transport agency records to provide on-site access to agency records stored off-site will be set at the rates set forth in the Board's agreement with its courier service provider. Rate information is available on the Board's website (www.stb.dot.gov), or can be obtained from the Board's Information Officer, Suite 880, Surface Transportation Board, Washington, D.C. 20423-0001.

* * * * *

(g) * * *

(7) The fee for photocopies shall be \$1.00 per letter or legal size exposure with a minimum charge of \$5.00.

(8) The fees for ADP data are set forth in paragraph (f) of this section.

* * * * *

(h) Fees for services described in paragraphs (a) through (g) of this section may be charged to accounts established in accordance with 49 CFR 1002.2(a)(2), or paid for by check, money order, currency, or credit card in accordance with 49 CFR 1002.2(a)(3).

* * * * *

3. Amend section 1002.2 as follows:

a. From paragraph (g)(1)(ii) remove “6.00” and in its place add “\$20.00”;

b. Remove paragraphs (f)(100)(ii) and (v)-(vii), and (f)(101)(ii), (iv) and (v).

c. Redesignate paragraph (f)(2) as paragraph (f)(2)(i); redesignate paragraph (f)(27) as paragraph (f)(27)(i); redesignate paragraphs (f)(56)(ii) and (iii) as paragraphs (f)(56)(iii) and (iv); redesignate paragraph (f)(61) as paragraph (f)(61)(i); redesignate paragraph (f)(78)(i) as paragraph (f)(78); remove paragraph (f)(78)(ii); redesignate paragraphs (f)(100)(iii) and (iv) as paragraphs (f)(100)(ii) and (iii) and redesignate paragraphs (f)(101)(iii) and (vi) as paragraphs (f)(101)(ii) and (iii).

d. Revise the last sentence of paragraph (a)(1), paragraph (a)(2), the first sentence of paragraph (b), and paragraphs (f)(27)(i), (f)(47), (f)(48), (f)(60) through (f)(62) and (f)(86).

e. Add paragraphs (f)(2)(ii) and (iii), (f)(12)(iv), (f)(27)(ii), (f)(38)(vii), (f)(39)(vii), (f)(40)(vii), (f)(41)(vii), (f)(56)(ii) and (v), (f)(63), (f)(64), (f)(88) and (f)(101)(iv).

The added and revised text is set forth as follows:

§ 1002.2 Filing fees.

(a) * * *

(1) * * * Filing fees for tariffs, including schedules, and contract summaries, including supplements (Item 78), and filing fees for documents submitted for recording (Item 83) may be charged to accounts established by the Board in accordance with paragraph (a)(2) of this section.

(2) *Billing account procedure.* Form STB-1032 must be submitted to the Board's Section of Financial Services to establish STB billing accounts for filing fees for tariffs and for documents submitted for recording.

* * * * *

(b) Any filing that is not accompanied by the appropriate filing fee, payment via credit card or STB billing account, or a request for waiver of the fee, is deficient.

* * *

(f) Schedule of filing fees.

Type of Proceeding	Fee
* * * * *	
(2) (i) * * *	
(ii) A petition for exemption under 49 U.S.C. 13541 (other than a rulemaking) filed by a non-rail carrier not otherwise covered	\$2,300.
(iii) A petition to revoke an exemption filed under 49 U.S.C. 13541(d)	\$1,900.
* * * * *	
(12) * * *	
(iv) A request for determination of a dispute involving a rail construction that crosses the line of another carrier under 49 U.S.C. 10901(d)	\$200.
* * * * *	
(27) (i) A request for a trail use condition in an abandonment proceeding under 16 U.S.C. 1247(d)	\$200.
(ii) A request to extend the period to negotiate a trail use agreement	\$300.
* * * * *	

(38)* * *	
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a) . .	\$3,800.
(39)* * *	
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a) . .	\$3,800.
(40)* * *	
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a) . .	\$3,800.
(41)* * *	
(vii) A request for waiver or clarification of regulations filed in a major financial proceeding as defined at 49 CFR 1180.2(a) . .	\$3,800.
* * * * *	
(47) National Railroad Passenger Corporation (Amtrak) conveyance proceeding under 45 U.S.C. 562	\$200.
(48) National Railroad Passenger Corporation (Amtrak) compensation proceeding under Section 402(a) of the Rail Passenger Service Act	\$200.
* * * * *	
(56)* * *	
(ii) A formal complaint filed under the small rate case procedures	\$150.
(iii)* * * * *	
(v) A request for an order compelling a carrier to file a common carrier rate	\$200.

* * * * *	
(60) A labor arbitration proceeding	\$200.
(61) (i) An appeal of a Surface Transportation Board decision on the merits or petition to revoke an exemption pursuant to 49 U.S.C. 10502(d)	\$200.
(ii) An appeal of a Surface Transportation Board decision on procedural matters except discovery rulings	\$250.
(62) Motor carrier undercharge proceeding	\$200.
(63) Expedited relief for service inadequacies:	
(i) A request for expedited relief under 49 U.S.C. 11123 and 49 CFR part 1146 for service emergency	\$200.
(ii) A request for temporary relief under 49 U.S.C. 10705 and 11102, and 49 CFR part 1147 for service inadequacy	\$200.
(64) A request for waiver or clarification of regulations except one filed in an abandonment or discontinuance proceeding, or in a major financial proceeding as defined at 49 CFR 1180.2(a) . . .	\$400.
* * * * *	
(86) Informal opinions:	
(i) A request for an informal opinion not otherwise covered . . .	\$1,100.
(ii) A proposal to use on a voting trust agreement pursuant to 49 CFR 1013 and 49 CFR 1180.4(b)(4)(iv) in connection with a major control proceeding as defined at 49 CFR 1180.2(a)	\$3,500.
(iii) A request for an informal opinion on a voting trust agreement pursuant to 49 CFR 1013.3(a) not otherwise covered	\$350.
* * * * *	
(88) Basic fee for STB adjudicatory services not otherwise covered	\$200.

* * * * *	
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in a Board or State proceeding that:	
(i) Does not require a Federal Register notice:	
(a) Set cost portion	\$100.
(b) Sliding cost portion	\$32 per party.
(ii) Does require a Federal Register notice:	
(a) Set cost portion	\$300.
(b) Sliding cost portion	\$32 per party.
* * * * *	
(100) Uniform Railroad Costing System (URCS) software and information:	
(i) Initial PC version URCS Phase III software program and manual	\$50.
(ii) Updated URCS PC version Phase III cost file - per year	\$25.
(iii) Public requests for <u>Source Codes</u> to the PC version URCS Phase III	\$100.
(101) Carload Waybill Sample data or recordable disk (R-CD):	
(i) Requests for Public Use File on R-CD - per year	\$250.
(ii) Waybill - Surface Transportation Board or State proceedings on R-CD - per year	\$500.
(iii) User Guide for latest available Carload Waybill Sample . . .	\$50.

(iv) Specialized Programming for Waybill requests to the Board	\$76 per hour.
* * * * *	